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IN THE

SUPREME COURT OF THE UNITED STATES

No. 75-1155

ROOSEVELT BUCHANON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals,
Seventh Circuit

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BLEED THROUGH

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SUPREME COURT OF THE UNITED STATES

No. .....

ROOSEVELT BUCHANON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals,
Seventh Circuit

Roosevelt Buchanon, your Petitioner, respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals, Seventh Circuit, entered in the above-entitled cause on December 30, 1975.

OPINIONS BELOW

This cause was decided by the United States Court of Appeals for the Seventh Circuit on December 30, 1975, see Appendix "A". A Petition for Rehearing or, in the Alternative to Transfer to Court En Banc, Court of Appeals, Seventh Circuit or in the

Alternative, to Stay the Mandate Pending Application for Certiorari was timely filed, and, subsequently denied by the Court of Appeals, Seventh Circuit, on January 30, 1976, see Appendix "B".

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on December 30, 1975, with an order denying Petition for Rehearing entered on January 30, 1976. The jurisdiction of this Court is invoked under 28 USC, Section 1254(1) and Rule 19.1(b) of the Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED

There are two questions to be presented to the Supreme Court of the United States. They are as follows:

1. Whether the admission into evidence by the government testimony concerning the issuance of search warrants in the cause at bar is immaterial and so highly prejudicial to the Defendant, as to deny the Defendant due process.

2. Whether the denial of Defendant's proffered instruction on coercion as a defense to murder, thus denying Defendant of a legitimate defense, was proper, in light of the fact that there appears to be little, if any, federal precedent on this issue.

Cases Cited

Spinelli v. United States, 393 U.S. 910, 89 S.Ct. 584;

Shannon v. United States, 76 F.2d 490, 493 (10th Cir., 1935).

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Statutes Cited

18 U.S.C. 1114;

18 U.S.C. 2114;

28 U.S.C. 1254(1);

Supreme Court Rule 19.1(b).

STATEMENT

Petitioner was indicted by the Federal Grand Jury in one count for violation of Section 1114, Title 18, United States Code, and in one count for violation of Section 2114, Title 18, United States Code.

A trial upon the issues resulted in Petitioner being found guilty upon each count for which he had been indicted; and, thereafter, Petitioner was sentenced to imprisonment for life on Count I and sentenced to imprisonment for twenty years on Count II, with the sentence under Count II to run consecutively with the sentence imposed under Count I.

During the trial, the Respondent called to the stand Clifford Desimone, whose testimony, and the objections to it by Petitioner, is reproduced in Appendix "C". The substance of this witness's testimony deals with the issuance of search warrants to search a certain Post Office Box No. 81. This testimony was admitted over Petitioner's objections.

At the close of the case the Court denied Defendant's Instruction No. 3, see Appendix "D". Said denial was made over Petitioner's arguments as to the propriety and necessity of the presentation of said instruction to the jury.

REASONS FOR GRANTING THE WRIT

An examination of the statement heretofore set forth in this Petition will reveal that Petitioner was charged by the United States of America for the offenses of killing a federal employee while in the performance of said employee's official duties and stealing government property from said employee's control. An examination of Appendix "C" will demonstrate that the testimony of Respondent's witness, Clifford Desimone, in reference to the search warrants was irrelevant and immaterial to the issues at hand. The obtainment of a search warrant by this witness for the Post Office Box No. 81, the envelope, and its contents was not an issue, as the Petitioner had not challenged the validity of said search warrant. The Petitioner's constitutional rights in reference to the Fourth Amendment and the "Due Process" clause were violated.

These rights are violated because the issue of probable cause to issue a search warrant is a legal question, not a question of fact for the jury, *Spinelli v. United States*, 393 U.S. 910, 89 S.Ct. 584. The production of search warrants, before the Defendant raises the issue of their validity, allows the government to introduce a self-serving, immaterial statement that gives the aura of judicial credence to the fact that there was information that indicated the guilt of the Defendant. Such a practice is enough departure from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision.

The admission of such evidence in the District Court, which is sanctioned by the Court of Appeals in its affirmance of the lower court's decision, which is immaterial, yet highly prejudicial to the Petitioner in the eyes of the jury, raises an issue upon which a definitive ruling by the Supreme Court is required.

An examination of Appendix "D" will demonstrate that the proffered instruction of the Petitioner is relevant to the issues

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at hand. The District Court denied submission of said instruction to the jury. Said denial was improper for the following reason. The denial of said instruction eliminates the defense that there is a legal excuse for Petitioner's conduct.

To be a legal excuse, the coercion must be immediate and of such a nature as to induce a well-founded fear of impending death or serious bodily injury. *Shannon v. United States*, 76 F2d 490, 493 (10 Cir. 1935). According to the testimony of the Defendant, as in Appendix "E", such a situation existed in this case.

Statements that this defense is not applicable to murder cases are incorrect statements of what the law is or what the law should be. All such statements deny a Defendant one of his proper defenses. These statements skip a step in the judicial process and assume a legal conclusion as to the definition of certain acts, such assumptions being highly prejudicial to the Defendant. Acts are not "murder" until a jury so decrees in a verdict. By assuming that certain acts are murder, and using such assumptions as grounds for denial of the above instruction, the Court denies Defendant of one of his rights. That right is the right of the Defendant to have the jury consider the "coercion or compulsion" factor as a defense to the prosecution's claim that the jury label Defendant's acts as murder.

CONCLUSION

Therefore, it is respectfully submitted that this Petition for Writ of Certiorari should be sustained.

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APPENDIX

EXHIBIT A

Unpublished Per Curiam Order

United States Court of Appeals
for the Seventh Circuit
Chicago, Illinois 60604

December 30, 1975

Before

Hon. Thomas E. Fairchild, Chief Judge

Hon. Luther M. Swygert, Circuit Judge

Hon. Philip W. Tone, Circuit Judge

United States of America, Plaintiff-Appellee, No. 75-1585 vs. Roosevelt Buchanan, Defendant-Appellant.	Appeal from the United States District Court for the Eastern District of Illinois East St. Louis Division No. 75 CR 17 E James L. Foreman, Judge.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Illinois, East St. Louis Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed, in accordance with the order of this Court entered this date.

EXHIBIT B

United States Court of Appeals
for the Seventh Circuit
Chicago, Illinois 60604

January 30, 1976

Before

Hon. Thomas E. Fairchild, Chief Judge

Hon. Luther M. Swygert, Circuit Judge

Hon. Philip W. Tone, Circuit Judge

United States,
Plaintiff-Appellee,

No. 75-1585 vs.

Roosevelt Buchanan,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Illinois, East St. Louis Division. (75 Cr 17 E)

On consideration of the petition for rehearing and suggestion that it be reheard *en banc* filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge having voted to grant the suggestion, and all of the members of the panel having voted to deny a rehearing,

IT IS ORDERED that the petition for a rehearing in the above-entitled cause be, and the same is hereby, DENIED.

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EXHIBIT C

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A. In post officebox—I believe it was box 81.

Q. And what did you do with it sir?

A. I received this envelope from the custody of the acting postmistress, a Selma Senn who extracted it from post office box 81.

Q. And what did you do with it?

A. I initialed it and had her initial it and maintained custody of it.

Q. Until what time?

A. Until such time as it went to the United States Magistrate.

Q. Alright sir, and what did you do at the magistrates?

A. Obtained a search warrant for the envelope and the contents?

Mr. Shaw: Wait just a second, could we approach the bench?

The Court: Alright gentlemen.

(The Following Discussion Was Then Had at Sidebar Outside of the Jury).

Mr. Shaw: Your Honor, the defendant would ask that the jury be discharged and a mistrial declared, because of the government's putting into evidence the constitutional right of the defendant to not be searched or have any of his belongings searched without a search warrant. This is evidence adduced as to his constitutional right, just as much as invoking the right to have a lawyer present and to remain silent, and that by so giving evidence and adducing evidence that a search warrant was issued it infers to the jury that there was reasonable cause

for said search warrant, which is a legal question, which has already been ruled upon by the

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court, and it puts before the jury the fact that the warrant was providently issued there by creating an inference of guilt as far as the defendant is concerned. It puts before the jury pure and simply the police procedure exercised by the postal inspectors.

Mr. Evers: Well, we have got a right to make a record that what was legal.

Mr. Shaw: That's already been determined.

Mr. Evers: I don't see where he has been prejudiced by the fact that we got a search warrant. There is nothing illegal about getting a search warrant. First of all he hasn't even said it—he said he went to the magistrate's office.

Mr. Shaw: He just said he got a search warrant—I think those were his words.

Mr. Evers: We have got just as much right to prove that we opened that with a search warrant as he does to argue to the jury that we violated his constitutional right in not getting the search warrant, and we have a right to put that before the jury to show that what we did was legal.

Mr. Shaw: Alright now, again I repeat what I said before, in effect what you are doing is by a self serving statement you are having a witness corroborating his own actions.

The Court: You are saying that it would be proper to introduce it?

Mr. Shaw: If I attack it—If I get up in front of this jury and attack it, then it would be proper to come back and prove that * * *

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EXHIBIT D

INSTRUCTION NO. 3

Coercion or compulsion may provide a legal excuse for the crime charged in the indictment. In order, however, to provide a legal excuse for any criminal conduct, the compulsion must be present, and immediate, and of such a nature as to induce a well-founded fear of impending death or serious bodily injury; and there must be no reasonable opportunity to escape the compulsion without committing the crime, or participating in the commission of the crime.

If the evidence in the case should leave you with a reasonable doubt whether, at the time and place of the alleged offense, the accused acted, or failed to act, willingly and voluntarily; that is to say, whether the accused was forced in effect to commit or aid in the commission of the crime charged in the indictment by coercion or compulsion, as just explained, then you should acquit the accused.

EXHIBIT E

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didn't you?

A. No, no, I did not.

Q. Okay, how did you get them?

A. Well, after I paid for the money orders, the postmistress still had the money in her hand and she also had the money orders in her hand, she laid the money orders down and she had the money in her hand, then all of a sudden the door of the post office was opened and two men comes inside, both of them wearing masks.

Q. And what happened then?

A. All I could notice was one man had a red beard. He was pulling it down as he was coming through the door—struggling with some sort of stocking mask and it wasn't too long in length. Then as he was coming in I noticed that Charlotte you know looked up and said "what's going on" and I started backing away from the counter towards the wall and the one with the shotgun comes in and points it at me and another guy comes in with a small hand gun, I don't know what brand—what kind it was, but it was a silver colored hand gun, he also had on a mask and they were both wearing black jackets that day and also after the one holding the gun on me, the other guy comes in, he goes over the counter and Charlotte, she backs away and this guy runs around and opens the door and the other guy with the shotgun motions for me to come inside the room where Charlotte was working in, so I comes inside and he closes the door behind me. I goes over and stands right beside Charlotte. Charlotte never seemed afraid at all of what was going on. She just kept questioning the man. She kept asking, what do you want in here, and then the next thing—or before that when the guy jumped

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over the counter, she told him to get out of there first and after then Charlotte just kept looking at both of them——

Q. Well, let me interrupt you just a minute, you used a name, what are you saying, Charlotte or Shorty or what?

A. Charlotte—that's Charlotte Wheatley the post mistress.

Q. Is her first name Charlotte?

A. Yes, I have always called her that.

Q. You knew her well?

A. Yes.

Q. She knew you?

A. Yes.

Q. You would speak to each other?

A. That's right.

Q. Alright, go ahead then, just so we know who we are talking about when you say Charlotte.

A. Okay, then I was standing beside Charlotte and the only last words she had a chance to say, was "I think I know"—she pointed to one of the men—the man with the hand gun and he also had a type of object like a tire wrench or tool or something like that in his hand and she said "I think I know" and that's the farthest she ever got to say and he hit her across the mouth with the object and also he strikes her beside the head pushed her down to the floor and then he hands the tool over to the guy who is holding the shotgun and he walks over—or rather the guy with the hand gun walks over to the counter and starts opening up the counter drawers, then the guy with the shotgun says to me—he tells me to take the object

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that he is holding in his hand and I ask him what for and later on he says "I want you to bash her head in" and I told him that I could not do that and he walks over to me and he thrusts the barrel of the shotgun towards my head and he says "I know where your little boy is at and if you don't do as we tell you to, I'm going to kill him and anybody else that gets into our way." And then I started over to pick up the tool off of the floor because he had placed it on the floor, and I picked it up and he pushed me over towards where Charlotte is and I looked at Charlotte and I knew she was just in pain, she was making awful moaning noises and I just couldn't do that—I just stood there and I was just shaking and I just couldn't, it was just a horrible experience to go through. I just stood there a while and he comes up to me again and thrusts the barrel to my head and says "he is going to blow my brains out all over this place" and then he said "if you haven't forgotten what I said I would do to your little boy" and then it just seemed like everything became black to me and I just started swinging and I just couldn't quit swinging and it was just a horrible experience.

Q. What happened then, after that?

A. After I was swinging and hitting with the tool, I kept hearing him saying "harder" every time I would swing he would say "harder, hit her again" he would keep saying "harder" each time I hit her and it seemed like I came to my senses and I ask him "haven't you done enough already," and finally he makes me drop the tool and walk over into the corner and that's when I thought he was going to blow my head off right then and he walks away over to where the other guy is over there by the counter and I heard

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one of the men say "there is seventeen dollars and some change" and I don't know if that is exactly true what they were taking

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or not, but I heard one of them try and open another drawer and I don't know what took place and I stood there and they told me not to move and I was standing in the corner and all of a sudden they was gone and I don't know how long I stood there and I don't know why I did the things I did. I was just so panicky just thinking about my little boy and all I could think about and I don't even know why I picked up those money orders off of the floor. After he hit her the money orders went all over the floor plus he took the money that I had from Charlotte—the one with the hand gun took my money that Charlotte had in her hand, it was five hundred and six dollars, he took it and he left.

Q. And that was your money that you had paid?

A. That was my money, correct. And really I don't know how long I was standing there, but they was gone and I picked up the money orders and I left. I cannot remember how I left. It was just such an experience that I couldn't cope with it and I don't even know why—I just couldn't contact the right authorities—it was just such an upsetting experience—a horrible experience—I just don't know why I did the things that I did at that time. It just seems like it wasn't real, it just seems like it was all a dream. It just seems like nothing like this could really ever happen. I have never had an experience like that, even though I was a police officer at one time—I just wasn't able to cope with that situation at that time—just the fact that it was all real.

Q. Now let me ask you this, directing your attention back to the night * * *

SUPREME COURT, U. S.

FILED

FEB 17 1976

MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 75-1155

OCTOBER TERM, 1975

ROOSEVELT BUCHANON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS SEVENTH CIRCUIT

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BLEED THROUGH

In the
United States Court of Appeals
For the Seventh Circuit

No. 75-1585

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ROOSEVELT BUCHANAN,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Illinois, East St. Louis Division.
No. 75 Cr 17 E
JAMES L. FOREMAN, *Judge.*

ARGUED DECEMBER 3, 1975 — DECIDED DECEMBER 30, 1975*

Before FAIRCHILD, *Chief Judge,* SWYGERT and TONE, *Circuit Judges.*

PER CURIAM. On March 4, 1975 a person who had entered the United States Post Office in East Carondelet, Illinois, struck the postmistress, Charlotte H. Wheatley, on the head with an iron instrument. Ms. Wheatley suffered multiple skull fractures and brain lacerations from which she died on March 11, 1975. At the time of the assault four United States postal money orders were stolen from the post office.

* This appeal was originally decided by unreported order of December 30, 1975. See Circuit Rule 28. The court has subsequently decided to issue the decision as an opinion.

A latent palm print, identified as that of Roosevelt Buchanan, was removed from the counter of the East Carondelet post office by an FBI fingerprint expert.

Subsequently, a letter addressed to the Harrisonville Telephone Company was retrieved by a postal inspector from a post office box from which defendant received mail. After obtaining a search warrant the inspector opened the letter. Inside was a United States postal money order payable to the telephone company and signed by the defendant. The money order was one of the four stolen from the post office on the day of the assault.

Another of the stolen money orders, with blood on it, was received by Lucille Smith from Roosevelt Buchanan. Arlene Drake received another of the money orders from Buchanan for rent. The three money orders corresponded to debts owed by the defendant for his rent, his telephone bill, and his electric bill. The customer's copies for the three money orders were found on the person of the defendant.

The defendant was arrested in East St. Louis at 8 P.M. on March 6, 1975 by United States Postal Inspectors. They advised him of his constitutional rights. A short time later he admitted the assault on Ms. Wheatley and the taking of the money orders and some cash. The confession was put in writing; the defendant signed it.

After the arrest the defendant's home was searched pursuant to a search warrant. On the porch, a truck lug wrench was found. Inside the home were found a card and an envelope with the money order amounts written on them. The officers also seized a pair of shoes.

Hair from the victim's head was found on the wrench. Her blood was found on the wrench, on one of the defendant's shoes, and on one of the money orders. The defendant's fingerprints were found on one of the money orders and on two of tfhe envelopes enclosing the money orders. The defendant's handwriting and printing were found on the three filled out money orders and the enclosure envelopes.

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Roosevelt Buchanan was indicted in a two-count indictment; Count I charging him with the offense of killing an employee of the United States Postal Service while the employee was performing official duties, in violation of 18 U.S.C. § 1114; the second count charging him with robbing mail matter or money from a person having lawful custody of the property and putting the life of that person in jeopardy by the use of a dangerous weapon, in violation of 18 U.S.C. § 2114.

A pretrial hearing was conducted relating to the voluntariness of the confession. The hearing showed that the defendant was twice warned of his rights before he confessed. The motion to suppress the confession was denied.

At trial the defendant admitted that he had been advised of his rights and that there had been no physical coercion. He testified that he assaulted the postmistress because two masked men threatened him and threatened to kill his son unless he committed the assault; that these men robbed the post office of the money, but that he had paid for the money orders. A jury found the defendant guilty of both charges.

This appeal is from that conviction. The defendant has alleged a number of trial errors, any or all of which he claims require a reversal.

I

At the start of the trial the defendant objected to the jury venire. Since he was black and the victim was white, he contended that the venire lacked a sufficient number of prospective jurors from minority racial groups. Seven of the forty-one veniremen were black. Since the trial was held in East St. Louis, which has a large black population, the defendant argued that the venire should have contained more black members.

The trial court correctly overruled defendant's objection. The venire was drawn from the county where East St. Louis is located and also from the surrounding counties according to a jury selection plan adopted and approved in accordance with 28 U.S.C. §§ 1861, *et. seq.*

As the trial judge noted, the seventeen percent of blacks on the venire represented an even higher perecentage of nonwhite citizens than exists in the pertinent area covered by the plan.

The defendant neither claimed nor alleged a systematic exclusion of blacks. Accordingly, there was no constitutional flaw in the selection of the jury venire from which the jury was selected. *Apodaca* v. *Oregon,* 406 U.S. 404, 413 (1972).

II

The defendant contends that the trial judge committed reversible error by permitting the Government to elicit from a government witness the fact that a search warrant had been obtained before entering the post office box rented by the defendant and the fact that a second search warrant had been obtained to search the defendant's home and seize certain items that were admitted into evidence. He states that the evidence regarding the issuance of the warrants was neither relevant nor material. The defendant asserts that: "[this evidence] was also detrimental to defendant in that it gave an aura of judicial credence to the fact that there was information that indicated the guilt of this defendant." He sums up his argument by saying that since the searches were not in controversy the evidence about them was irrelevant and prejudicial.

Defendant's contention is totally without merit. The legality of a search is always relevant and the evidence that search warrants were issued, although perhaps not material in a strict sense, was not prejudicial to the defendant's case. Even should there have been error in the admission of this evidence, it was harmless error.

III

Defendant objects to the admission into evidence of a so-called "Postal Inspection Service Warning and Waiver of Rights" form which had been signed by the defendant before he confessed. The form contained the required *Miranda* warnings. The defendant states in brief: "The admission of any document such as [this

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form] which invades the province of the Court, and purportedly forecloses the Court from ruling on the issue of the validity of the waiver of the '*Miranda*' rights is so detrimental to the rights of the defendant as to be prejudicial error."

The argument is frivolous and merits no discussion.

IV

Defendant claims prejudicial error by the admission into evidence of his written confession. His argument is that "[t]he testimony at trial leaves no doubt that the will of the defendant was overborne by the arresting officers." As indicated previously, a hearing was conducted by the trial judge on a motion to suppress the confession prior to trial. We have reviewed the record and rule that the judge had ample reason to deny the motion. A trial court's findings, including credibility, on the question of a defendant's confession must be sustained unless clearly erroneous. *United States* v. *Crovedi*, 467 F.2d 1032, 1036 (7th Cir. 1972), *cert. denied*, 410 U.S. 982, *cert. denied*, 410 U.S.990. There was no showing that the defendant's will was by physical or psychological means overborne by the officers.

The defendant testified at trial that he did not know what was happening when he confessed; that his wife was threatened and that answers were suggested. In addition, he claims that the statement was a "selectively prepared document concocted by the arresting officers." The manner in which the confession was obtained and its voluntariness were issues before the jury. The jury was required to make credibility determinations. The trial judge correctly instructed the jury with regard to the issues concerning the confession. There was no error in its admission.

V

Defendant contends that it was reversible error for the trial judge not to grant his motions for judgment of acquittal at the close of the Government's case and at the close of all the evidence. He argues in his brief: "Without the inclusion of the alleged confession, which De-

fendant maintains was improperly admitted, this case becomes a circumstantial evidence case, as there were no witnesses to the offenses in the indictment." The answer to his argument is twofold. First, as we have ruled, the confession was properly admitted into evidence. Second, even without the confession there was sufficient circumstantial evidence, viewed in the light most favorable to the Government, for the jury to find the defendant guilty as charged beyond a reasonable doubt. We shall not attempt a more detailed recitation of that evidence than that stated in the preceding paragraphs of this opinion.

VI

Over objection the trial judge instructed in pertinent part:

> If it be shown that the Defendant used a dangerous weapon in the commission of a homicide, then you may find, from the use of such weapon, in the absence of explanatory or mitigating circumstances, the existence of the malice which is an essential element of the offense. . . . A "dangerous weapon or device" includes anything capable of being readily operated, manipulated, wielded or otherwise used by one or more persons to inflict severe bodily harm or injury upon another person.

The defendant contends that these instructions raised a presumption that a tire lug wrench is a dangerous weapon. He argues in his brief: "A lug wrench is not 'per se' a dangerous weapon; . . . a weapon has to be more than just capable of producing death or great bodily injury to be a dangerous weapon. . . . [It] must be *likely* to produce death or great bodily injury when used, as with a gun, an axe, or a large knife."

The complete answer to this contention is found in *United States* v. *Johnson,* 324 F.2d 264 (4th Cir. 1963). There the court said of a metal and plastic chain:

> While it may not be a dangerous weapon per se . . . almost any object "which as used or attempted to be used may endanger life or inflict great bodily harm . . . or which, as it is sometimes expressed,"

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> is likely to produce death or great bodily harm, can in certain circumstances be a dangerous weapon. . . . Not the object's latent capability alone, but that, coupled with the manner of its use is determinative. 324 F.2d at 266.

There was no error in giving these instructions.

VII

Defendant next contends that it was prejudicial error for the trial judge not to have required the Government to elect whether to proceed on Count I or Count II of the indictment, and that the judge erred in giving instructions that covered both offenses, thereby putting the defendant as a matter of law twice in jeopardy. He argues that an assualt is a lesser included offense in a murder charge inasmuch as the assault is an essential element of both offenses.

That one or more of the elements of two offenses are the same is not controlling. The offenses described in Counts I and II are distinct. One may be committed without having committed the other. In *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932), the Supreme Court said:

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. . . . A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.

Here, as the Government points out in its brief, there is no element of robbery in Count I but robbery is an element of the offense charged in Count II. There is no element of killing in Count II, but that is an element in Count I.

The trial judge committed no error in not requiring the Government to elect between the counts or in charging the jury as he did on this matter.

VIII

Finally, the defendant contends that the trial judge should have given his instruction on the defense of coercion, based on his trial testimony that two masked men in the post office while he was there threatened to kill his "little boy and any one else that gets in our way" and to blow the defendant's "brains out" unless he picked up the lug wrench lying on the floor and "bashed her [Ms. Wheatley's] head in." Defendant argues that the proffered instruction to the effect that coercion or compulsion may provide a legal evcuse for the crimes charged against him should have been given.

It was not error for the trial judge to deny the requested instruction. As the Government points out in its brief, there was no evidentiary basis for a coercion instruction with regard to Count II. Count I charged murder and coercion is not a defense to murder. *R. I. Recreation Center* v. *Aetna Casualty and Surety Co.*, 177 F.2d 603 (1st Cir. 1949); 40 A.L.R.2d 908, 909 § 1. *See also Shannon* v. *United States*, 76 F.2d 490 (10th Cir. 1935).

In summary, the trial judge committed no reversible errors; though perhaps, one harmless error. Accordingly, the judgment of conviction is affirmed.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit